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March 28, 2003

Chief of Records
Attn: Request for Comments
Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Re: Proposed Rule on Economic Sanctions Enforcement Guidelines

To whom it may concern:

The Joint Industry Group (JIG) welcomes the opportunity to comment on the proposed rule concerning the Economic Sanctions Enforcement Guidelines published by the Office of Foreign Assets Control (OFAC) in the Federal Register on January 29, 2003 (68 Fed. Reg. 4422-29).

JIG is a member-driven coalition of over 160 companies, trade associations and businesses actively involved in international trade. JIG examines the concerns of the business community relative to current and proposed international trade-related policies, legislation and regulations. The coalition helps develop solutions to these concerns by working directly with the Departments of Commerce, State, and Treasury, the U.S. Customs Service, the Office of the U.S. Trade Representative, and the U.S. Congress. JIG membership represents more than $350 billion in trade.

JIG offers the following comments with respect to the proposed rule.

1. JIG Strongly Supports Publication of OFAC's Enforcement Guidelines

First, JIG welcomes and strongly supports OFAC's decision to publish an updated version of its previously internal Economic Sanctions Enforcement Guidelines. This decision will promote consistency in enforcement actions and greater transparency of OFAC procedures. By taking this important step, OFAC will better inform the regulated community and maximize voluntary compliance with the various sanctions laws and regulations. JIG strongly urges OFAC to continue to take similar steps to expand and enhance the transparency of its operations and decision making standards.

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2. The Pre-penalty Notice Should Clearly Articulate How the Amount of the Proposed Penalty Was Determined

OFAC should clearly explain in the pre-penalty notice how the proposed penalty was determined. For example, an explanation would be particularly important for a complex transaction involving the export of both goods and services as part of the performance of a contract that involves travel to the sanctioned country to deliver the services. In addition, the pre-penalty notice should cite the documents that OFAC relies on in deriving the proposed penalty amount.

3. Mitigation Accorded for First Offenses Should Be Over and Above the Mitigation Due to Voluntary Disclosure

JIG supports OFAC's decision to include in the proposal an explanation of the impact of voluntary disclosure on the amount of any possible penalty. The proposal to mitigate penalties involving violations that have been voluntarily disclosed by the violator permits companies to immediately and concretely understand the value of a voluntary disclosure, and will enhance compliance with U.S. sanctions. The proposal to mitigate penalties involving "first offenses" by "at least 25 percent" should be over and above the "voluntary disclosure" mitigation of "at least 50 percent," absent aggravating circumstances. Thus, a proposed penalty of $10,000 involving a first-time violation that has been voluntarily disclosed and that does not involve any aggravating factors should be mitigated to no more than $2500.

4. The Values in Section III.A.2 Should Be Clearly Defined and Consistent with Related Law

Section III.A.2 of the Appendix to Part 501 makes multiple references to values (transaction value, foreign value, domestic value, and default value) without defining these terms or defining them by reference to other statutory definitions, *e.g.*, the customs valuation statute. In addition, the proposed rule is inconsistent with existing law on the valuation of imports and exports of goods and unnecessarily creates new, undefined terms that OFAC lacks the expertise to administer. OFAC should instead determine the dollar value for proposed penalties based on existing law relating to the valuation of imports and exports.

For example, section III.A.2 states that proposed penalties in import seizure cases will generally be the transaction value or, where no transaction value can be demonstrated by credible evidence, "the foreign value as determined by the U.S. Customs Service."[1] "Foreign value" is

[1] JIG notes that "Bureau of Customs and Border Protection" should replace "U.S. Customs Service" throughout the rule.

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not defined and the proposed regulation provides no guidelines on how the U.S. Customs Service would determine the "foreign value." Creation of the new, undefined term "foreign value" is unnecessary. Instead, the rule should provide that the value of a seizure will be that determined by Customs pursuant to 19 U.S.C. § 1401a, which creates a hierarchy of rules that permit the valuation of all imported goods, including those for which there is no transaction value. Customs is well-versed in application of this statute and therefore its incorporation by reference into the OFAC rule would create predictability and uniformity in the amount of proposed OFAC penalties.

Section III.A.2 also provides that for exports, the dollar value in proposing a civil penalty generally will be the U.S. domestic value of the goods, technology, or services. Again, the value of exported goods could more easily be defined by reference to existing law. The Bureau of the Census has promulgated regulations on the export value to be declared on the Shipper's Export Declaration for exported goods.[2] At the very least, if OFAC intends to propose penalties equal to the "U.S. domestic value" of the goods, technology or services, it should define this term and how it will be derived. Absent a clear definition of this term, the proposed rule lacks predictability and may be administered inconsistently by OFAC officials using arbitrary or fictitious values.

5. Warning Letters Are Appropriate for a Variety of High-volume Transactions, and Should Not Be Limited by Dollar Amount for Transactions Involving the Importation or Exportation of Goods and/or Services.

In Section II.C.1, OFAC recognizes the high volume and level of automation of international funds transfers processed within the U.S. banking system on a daily basis and provides that OFAC may issue warning letters in lieu of civil penalties in cases that appear to involve technicalities, where good faith efforts to comply with the law and no aggravating factors are evident. JIG agrees with this approach and believes it strikes the appropriate balance between enforcement and informed compliance. However, the threshold ($500) for the use of warning letters for cases involving exports and imports is too low, and does not take into account e-commerce transactions which also can be high-volume and fully automated. For example, software may be downloaded from a website in high volumes and in an entirely automated fashion. OFAC should eliminate the dollar threshold and should instead provide that warning letters may be issued in lieu of civil penalties for high-volume, automated transactions involving imports and exports of goods or services.

6. The Standard for Deciding Whether to Initiate Civil Penalty Action Should Be a "Preponderance of the Evidence"

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2 *See, e.g.*, 15 U.S.C. §§ 30.7(q) and 30.30.

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Section I.B of the Appendix to Part 501 provides that in evaluating whether to initiate a civil penalty action, OFAC will determine whether there is "reasonable cause" to believe that a violation has occurred. This determination should instead be based on a "preponderance of the evidence." In other words, OFAC should only initiate civil penalty action when it believes that it is more likely than not that a violation has occurred. The "preponderance of the evidence" standard is used by other agencies such as the Commerce Department's Bureau of Industry and Security.

7. The Rule Should More Clearly Define the Requirements of a Valid Prior Disclosure

Section II.B.3 should more clearly define the requirements of a valid prior disclosure to ensure greater predictability for companies that are contemplating disclosure. The mere fact that OFAC may have received information from some other source should not impair the validity of a prior disclosure unless OFAC has acted on that information by initiating an investigation, as evidenced by some writing. In the Bureau of Customs and Border Protection's voluntary disclosure program, for example, a formal investigation is deemed to have commenced "on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of a violation existed."[3] Finally, a voluntary disclosure should also be valid notwithstanding the initiation of an investigation if the disclosing party has no knowledge of that investigation.

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3 *See* 19 C.F.R. §162.74(g).

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8. Violations Resulting from "Clerical Error, Inadvertence, or Mistake of Fact" Should Generally Be Mitigated to at Least 90 Percent in the Penalty Notice

Section III.B.1 provides that "clerical error, inadvertence, or mistake of fact" is a mitigating factor. JIG observes that with respect to some such clerical errors, and in the absence of any aggravating factors, it would be appropriate for OFAC to conclude that no penalty is warranted. At the very least, however, the proposed rule should go further and provide—similarly to what has been proposed for voluntary disclosures and first offenses—that the penalties for such violations will generally be mitigated in the cumulative amount (*i.e.*, over and above the "first offense" and/or "voluntary disclosure" mitigation) of at least 90 percent, absent any aggravating factors. Thus, in the case of a voluntarily-disclosed, first offense that resulted from a clerk accidentally striking a wrong key, for example, mitigation would be in the cumulative amount of at least 90 percent, absent any aggravating factors. Accordingly, the mitigation range stated in Section III.B.1 of the Appendix to Part 501 (*i.e.*, "10% to 75%") should be amended to read "10% to 90%" from the amount proposed in the prepenalty notice, depending upon the balance of mitigating and aggravating factors. Particularly where such clerical errors, inadvertences, or mistakes of fact occur notwithstanding a compliance program and are not the result of a systemic deficiency, no deterrent function is served by holding parties strictly liable for non-negligent violations.

9. The Rule Should Create an Incentive to Settle Cases and Should Provide Greater Certainty Regarding Settlement Offers

The proposal states that settlement may be proposed at any stage of a civil proceeding. However, the rule does not create any incentive for settling a case above and beyond the current mitigation guidelines. Because settlement saves the agency considerable time and money, there should be an additional 15 percent mitigation of the amount that would be proposed in the pre-penalty notice if settlement occurs before the issuance of a pre-penalty notice, and an additional 10 percent mitigation if settlement occurs within 45 days after the issuance of a pre-penalty notice.

In addition, the rule should impose certain deadlines on OFAC so that companies will know whether their settlement offers are being seriously considered. Section III.C should provide that OFAC will respond in writing to a proposed settlement within 30 days, subject to necessary extensions, of receiving a written description of the settlement offer. The failure to designate any period for responding to a settlement offer creates a situation that is so elastic that often the party negotiating with OFAC does not know if its settlement offer is being actively considered.

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In summary, JIG applauds OFAC's decision to publish its enforcement guidelines and thereby promote consistency and transparency of agency procedures. JIG respectfully requests, however, that the final rule be modified to address the concerns raised in the foregoing comments.

Respectfully submitted,

Robert Kimbrel

Robert Kimbrel
Chairman, JIG Export Committee